Supreme Court, U.S.
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No. 94-____

In The

Supreme Court of the United States

October Term, 1994

JANET JESSUP, Administrator of the Gambling Control Division; MARC RACICOT, Governor of the State of Montana; JOE MAZUREK, Attorney General for the State of Montana; ANDY POOLE, Deputy Director of the Department of Commerce; JUDY BROWNING, Chief of Staff for Policy and Legal Affairs; and THE STATE OF MONTANA,

Petitioners,

v.

THE BLACKFEET TRIBE OF THE BLACKFEET RESERVATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Congress, in the Indian Gaming Regulatory Act, validly abrogated the States' Eleventh Amendment immunity from suit in federal court pursuant to the Indian Commerce Clause.

2. Whether the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), applies to an action against individual state officers brought by an Indian tribe under the Indian Gaming Regulatory Act alleging that the defendants failed to negotiate in good faith as required by the Act.

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LIST OF PARTIES

The Petitioners in this Court are the State of Montana; Janet Jessup, administrator of the Gambling Control Division of the Montana Department of Justice; Marc Racicot, Governor of Montana; Joe Mazurek, Attorney General of Montana; Andy Poole, deputy director of the Montana Department of Commerce; and Judy Browning, Chief of Staff, Montana Governor's Office.

Respondent in this Court and Plaintiff below is the Blackfeet Tribe.

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OPINION AND ORDER BELOW

This case arose in federal district court for the District of Montana. On December 20, 1993, the District Court Judge dismissed the action in a memorandum opinion and order for lack of jurisdiction, holding that the Congress did not abrogate the State's sovereign immunity from suit in the Indian Gaming Regulatory Act and that the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), did not apply.

The Ninth Circuit Court of Appeals reversed and remanded the judgment of the District Court on the basis of *Spokane Tribe v. Washington*, 28 F.3d 991 (1994), *petition for cert. filed*, 63 U.S.L.W. 3209 (U.S. Aug. 29, 1994) (No. 94-357), entering this judgment on November 8, 1994. The order of the Ninth Circuit is reproduced in the appendix at A-1 to A-2. The memorandum opinion of the district court is reproduced in the appendix at A-3 to A-10. For the Court's convenience, the Court of Appeals' decision in *Spokane Tribe* is reproduced at A-11 to A-26.

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JURISDICTION

The Court of Appeals entered its order and judgment on November 8, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

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CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional Provisions

U.S. Const. art. I, § 8, cl. 3:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .

U.S. Const. amend. XI:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Statutes

The Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(7), provides in pertinent part:

> (A) The United States district courts shall have jurisdiction over--
>
> (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-

State compact under paragraph (3) or to conduct such negotiations in good faith . . . .

STATEMENT

I. The Indian Gaming Regulatory Act

In response to a proliferation of gaming on Indian reservations and increasing concern by the States, Congress in 1988 passed the Indian Gaming Regulatory Act [IGRA], 25 U.S.C. §§ 2701-2721, in 1988. Congressional intent was to provide a logical framework for the affected jurisdictions to regulate gaming, to encourage tribal self-reliance and economic development, to protect Indian gaming from organized crime and other corrupting influences, and to recognize the legitimate concerns of States with respect to certain forms of gambling. *See* 25 U.S.C. § 2701; *see generally* S. Rep. No. 446, 100th Cong., 2d Sess. 1-3, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3071-74. IGRA defines three classes of gaming. It preserves to the exclusive jurisdiction of tribes class I gaming, defined as "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals in connection with tribal ceremonies or celebrations." 25 U.S.C. § 2703(6). IGRA also provides for tribal regulation of class II gaming, consisting generally of bingo, bingo-like games, lotto, tip jars, pull-tabs, and certain card games if explicitly authorized by the laws of the involved State and if it is conducted pursuant to a tribal ordinance approved by the National Indian Gaming Commission. Id., §§ 2703(7), 2710(b). Class III gaming is all gaming not encompassed within the class I or class II definitions. Id., § 2703(8). IGRA authorizes class III gaming on Indian lands only if, inter alia,

it is conducted pursuant to a tribal-state compact. Id., § 2710(d)(1)(C).

IGRA requires a State, once served with a tribal request to negotiate, to negotiate in good faith to reach a compact. 25 U.S.C. § 2710(d)(3)(A). Any compact reached must then be approved by the Secretary of the Interior. Id., § 2710(d)(3)(B). If the State does not negotiate or fails to negotiate in good faith, IGRA vests the United States district courts with jurisdiction over an action by a tribe alleging refusal on the State's part to negotiate in good faith. Id., § 2710(d)(7)(A).

If the District Court finds that the State did not respond to the request to negotiate or did not respond to the request in good faith, the court must order the State and the tribe to conclude a compact within 60 days. 25 U.S.C. § 2710(d)(7)(B)(iii). Absent successful agreement within the 60 days, the State and tribe must be ordered to submit their last best offers for a compact to a mediator appointed by the court, and the mediator selects the one which best comports with applicable law. Id., § 2710(d)(7)(B)(iv). If the State does not accept the decision, the mediator notifies the Secretary of the Interior, who then prescribes conditions for class III gaming on the Indian lands. Id., § 2710(d)(7)(B)(vii).

II. The Proceedings Below

Pursuant to IGRA, Montana engaged in negotiations with the Respondent between 1989 and March 1993, when the Tribe filed the complaint below, asserting jurisdiction under 25 U.S.A. § 2710(d)(7)(A)(i) and 42 U.S.C. § 1983.

In May 1993 the State requested dismissal of the action on Eleventh Amendment grounds. In December 1993 the District Court granted the State's motion. The court agreed that it lacked jurisdiction over the State and its officials because Congress did not have the power to abrogate the State's sovereign immunity when legislating pursuant to the Indian Commerce Clause. (App. at A-7 to A-10.) The court further held inapplicable the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), to the extent prospective relief was sought against the Petitioners.

The Respondent appealed to the Court of Appeals. In November 1994 that court issued an order reversing the judgment of the District Court for the reasons set forth in *Spokane Tribe v. Washington*, 28 F.3d 991 (9th Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3209 (U.S. Aug. 29, 1994) (No. 94-357).

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REASONS FOR GRANTING THE PETITION

As acknowledged by the Court of Appeals in *Spokane Tribe*, its conclusion that Congress has the power under the Indian Commerce Clause to abrogate the States' immunity from suit in federal court conflicts with *Seminole Tribe v. Florida*, 11 F.3d 1016 (11th Cir. 1994). Four petitions and cross-petitions were filed by the parties to the *Seminole Tribe* litigation (63 U.S.L.W. 3113, (U.S. July 1, 1994) (No. 94-12), 63 U.S.L.W. 3114 (U.S. July 1, 1994) (No. 94-35), 63 U.S.L.W. 3171 (U.S. July 29, 1994) (No. 94-189), & 63 U.S.L.W. 3188 (U.S. July 28, 1994) (No. 94-219). One of those petitions, No. 94-12, presents the same issues as this petition and was granted on January 23, 1995. Petitions are now pending from the Ninth Circuit's decision in *Spokane*

Tribe and the more recent decision by the Tenth Circuit Court of Appeals in *Ponca Tribe v. Oklahoma*, 37 F.3d 1422 (10th Cir. 1994), *petitions for cert. filed*, 63 U.S.L.W. 3477 (U.S. Dec. 9, 1994) (Nos. 94-1029 & 94-1030). The Eighth Circuit Court of Appeals has also determined that Congress validly abrogated the State's Eleventh Amendment immunity in 25 U.S.C. § 2710(d)(7)(A)(i), but no certiorari proceedings were commenced with respect to its decision. *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993). As reflected in the Court's grant of certiorari in *Seminole Tribe*, the issues presented herein concerning the congressional authority to abrogate the States' Eleventh Amendment immunity and the reach of the exception created with respect to prospective relief against individual state officers in *Ex parte Young*, 209 U.S. 123 (1908), go to the core of the proper relationship between Congress and the States.

I. The Ninth Circuit's Holding on the Eleventh Amendment Abrogation Issue Directly Conflicts With the Holding on This Question by the Eleventh Circuit in *Seminole Tribe*.

Faced with two conflicting district court decisions in factually similar cases, the Eleventh Circuit consolidated the cases for decision in *Seminole Tribe v. Florida*, 11 F.3d 1016 (1994). It then ruled that Congress lacked authority to abrogate state sovereign immunity when legislating pursuant to the Indian Commerce Clause. The Tenth Circuit subsequently consolidated four district court cases with similar facts and issues in *Ponca Tribe v. Oklahoma*, 37 F.3d 1422 (10th Cir. 1994). The Eighth Circuit, the first appellate court to address the question, found abrogation but also

concluded that the State had negotiated in good faith. *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993). Neither party to that dispute sought review by this Court. The Eighth, Ninth and Tenth Circuits then reached their opposite conclusions on the basis of fundamentally different interpretations of the relationship between the Indian and the Interstate Commerce Clauses and the scope of congressional authority under those provisions to abrogate States' Eleventh Amendment sovereign immunity.

In *Seminole Tribe*, the court agreed with the Petitioners that, absent state consent, congressional abrogation under the Fourteenth Amendment or under the Interstate Commerce Clause, or the proper application of *Ex parte Young*, 209 U.S. 123 (1908), "the Eleventh Amendment serves as a jurisdictional bar to the suit." 11 F.3d at 1021, *citing Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). *Seminole Tribe* held that a State's participation in negotiations with tribes as mandated by IGRA cannot be deemed state consent to suit, that the "plan of the convention" consent doctrine (*Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991)) did not apply, and that application of the *Ex parte Young* fiction was not appropriate, since the act of negotiating over a tribal-state compact involves discretionary decisionmaking and since the tribes' suits were, in reality, against the involved States. 11 F.3d at 1028-29. As with the other circuits' analysis, however, *Seminole Tribe*'s principal focus was on congressional authority to abrogate state sovereign immunity under the Indian Commerce Clause.

In reaching its Eleventh Amendment determination, the Eleventh Circuit looked to this Court's decisions and noted that the Indian Commerce Clause has never before been interpreted as empowering Congress to override the

States' Eleventh Amendment immunity. 11 F.3d at 1024. The Court instead has found congressional authority to abrogate only under two provisions of the constitution--under the Fourteenth Amendment, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), and the Interstate Commerce Clause, *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989). In determining whether the Commerce Clause analysis was identical for each of that provision's distinct parts, the *Seminole* court relied on the reasoning in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), which acknowledged that the plenary powers under the Interstate Commerce Clause were intended to allow the federal government to intercede if necessary to prevent individual States from interfering with the free flow of commerce among the States. "By contrast, the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs. Although Congress has the power to limit the states under the Indian Commerce Clause as well, the different purposes underlying the two clauses mandate that they be treated differently. As a result, the unique abrogation power afforded Congress under the Interstate Commerce Clause in *Union Gas* cannot be extended to the Indian Commerce Clause." 11 F.3d at 1027.

In *Spokane Tribe*, and by reference here, the Ninth Circuit determined that this Court's recognition in *Union Gas* of congressional authority to abrogate state sovereign immunity under the Interstate Commerce Clause extended also to allow abrogation of state sovereign immunity under the Indian Commerce Clause. "'We are hard pressed to conclude that the congressional authority to abrogate the States' immunity in the area of interstate commerce is greater than in Indian commerce . . . . [W]e conclude that, based on its paramount and plenary authority over Indian affairs,

Congress' power to act pursuant to the Indian Commerce Clause is at least as great, if not greater, than its power under the Interstate Commerce Clause.'" (App. at A-23 to A-24.) While the Petitioners believe the result reached in *Seminole Tribe* on the issue was correct, for present purposes their concern is the diametrically opposed nature of that decision and *Spokane Tribe*. As these cases now stand, whether Eleventh Amendment immunity is available to States when sued under IGRA for alleged failure to negotiate in good faith is determined by the happenstance of the federal judicial circuit in which the State is located. Such happenstance should not control the existence of a State's constitutionally secured immunity from suit. The Court's grant of certiorari in *Seminole Tribe* embodies that conclusion. Because the operative facts in this case are identical to those in *Seminole Tribe*, this petition should be granted.

II. The Ninth Circuit Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court--a Question of Fundamental Federalism Which Requires Resolution by This Court to Resolve Conflicting Interpretations of Constitutional Law.

The matter of sovereign immunity goes to the very heart of the allocation of power between the federal and state governments. In *Dellmuth v. Muth*, 491 U.S. 223 (1989), the Court observed that "abrogation of sovereign immunity upsets the fundamental constitutional balance between the federal government and the States." More recently, in *Blatchford v. Village of Noatak*, 501 U.S. 775, 779 (1991), the Court held that "the States entered the federal system with their sovereignty intact; . . . the judicial authority in Article III is

limited by this sovereignty and . . . a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in 'the plan of the convention.'"

The only constitutional basis for abrogation, absent express authority as in the Fourteenth Amendment, articulated by this Court has been the Interstate Commerce Clause. Application of this reasoning to the Indian Commerce Clause ignores the very different purposes for the provisions and their historical antecedents.

Further, the implications of the Eighth, Ninth and Tenth Circuits' rulings go far beyond the numerous gaming cases presented in the federal court system at this time. A determination that Congress may abrogate state sovereign immunity when legislating pursuant to the Indian Commerce Clause will have broad consequences with respect to future congressional actions involving Indian affairs. Obviously the courts have struggled with this issue, and it can be resolved conclusively only by this Court.

III. The Court Should Review the Applicability of *Ex parte Young* to the Petitioners' Claim of Immunity.

The sole direction to the District Court came from the Ninth Circuit's incorporation of its reasoning in *Spokane Tribe*. The remand issue is complicated by the fact that the District Court held *Ex parte Young*, 209 U.S. 123 (1908), inapplicable and dismissed the action against the individual state officers. This issue is presented squarely by the petition filed in No. 94-12 from the Eleventh Circuit's *Seminole Tribe* decision as to which certiorari has been granted.

CONCLUSION

The Petitioners respectfully request that this Court issue a writ of certiorari to the Ninth Circuit Court of Appeals for the purpose of reviewing the questions presented.

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February 1995

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESERVATION, Plaintiff-Appellant, v. JANET JESSUP, Administrator of the Gaming Control Division; MARC RACICOT, Governor of the State of Montana; ANDY POOLE, Deputy Director of the Department of Commerce; JUDY BROWNING, Chief of Staff for Policy and Legal Affairs; and the STATE OF MONTANA, Defendants-Appellees.	C.A. No. 94-35079 D.C. No. CV-93-00031-PGH ORDER (Filed Nov. 8, 1994)

Appeal from the United States District Court
for the District of Montana
Paul G. Hatfield, District Judge, Presiding

Submitted, November 3, 1994*
Seattle, Washington

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* The panel unanimously finds this case suitable for decision on the briefs and record, without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Before: BEEZER and FERNANDEZ, Circuit Judges, and ORRICK,** Senior District Judge.

The matter is REVERSED and REMANDED for further proceedings in the district court in accordance with this court's decision in *Spokane Tribe of Indians v. Washington State*, 28 F.3d 991 (9th Cir. 1994).

** The Honorable William H. Orrick, Senior United States District Judge for the Northern District of California, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESERVATION, Plaintiff, vs. JANET JESSUP, Administrator of the Gaming Control Division; MARC RACICOT, Governor of the State of Montana; JOE MAZUREK, Attorney General for the State of Montana; ANDY POOLE, Deputy Director of the Department of Commerce; JUDY BROWNING, Chief of Staff for Policy and Legal Affairs; and the State of Montana, Defendants.	NO. CV-93-031-GF MEMORANDUM AND ORDER (Filed Dec. 20, 1993)

The Blackfeet Tribe of the Blackfeet Indian Reservation instituted the present action for a judgment declaring, in essence, that the State of Montana has, in contravention of the Indian Gaming Regulatory Act ("IGRA"), Pub.L. No. 100-497, 102 Stat. 2467 (1988) (codified at 18 U.S.C. §§ 1166-1168 and 25 U.S.C. §§ 2701-2721), failed to attempt, in good faith, to negotiate a compact with the Blackfeet Tribe that would govern

the conduct of gaming activities on the Blackfeet Indian Reservation.[1]

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[1] The complaint names, as defendants, numerous officials of the State of Montana charged with the responsibility of negotiating gaming compacts, on behalf of the State of Montana, with the various Indian tribes whose reservations are located within the boundaries of the State of Montana. The action, however, is, in substance, an action against the State of Montana because it seeks to compel state action. *See, Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89, 101 (1984). Accordingly, the court considers the action as one prosecuted against the State of Montana and shall refer collectively to the defendants as the State of Montana. In that regard, the court rejects the Blackfeet Tribe's invocation of the *Ex parte Young* doctrine as a basis for this court asserting jurisdiction over an action which is one for prospective injunctive relief against officials of the State of Montana.

In *Ex parte Young,* 209 U.S. 123 (1908), the Court established that the eleventh amendment does not operate as a bar to a suit in federal court to enjoin a state official from enforcing an unconstitutional statute, *see, Edelman v. Jordan,* 415 U.S. 651, 664 (1974), or restraining unconstitutional action threatened by a state officer. *See, Georgia R. Co. v. Redwine,* 342 U.S. 299, 304 (1952); *Pennhurst State School and Hospital,* 465 U.S. at 102. The State of Montana's argument suggesting the *Ex parte Young* doctrine is appropriately limited to actions challenging the constitutionality of a state official's conduct is compelling. *See, Pennhurst State School and Hospital,* 465 U.S. 102-103, 104, n.13. The doctrine, however, has been recognized as applicable to claims against state officials for violations of federal statutes. *See, Almond Hill School v. U.S. Dept. of Agriculture,* 768 F.2d 1030, 1034 (9th Cir. 1985); *see also, Atlantic Health Care Benefits Trust v. Foster,* 809 F.Supp. 365 (M.D. Pa. 1992). Nevertheless, the doctrine does not apply when the state official is performing a duty involving the exercise of discretion as opposed to a ministerial duty. *Ex parte Young,* 209 U.S. at 158. Compelling a state official to conclude a compact under the IGRA would, in this court's opinion, impermissibly infringe upon the discretion of the affected state official. *See, Ex parte Young,* 209 U.S. at 158.

The State of Montana has presented the court with a motion requesting the action be dismissed because the court is without jurisdiction to render judgment against the State of Montana for the relief requested by the Blackfeet Tribe. In response to the State of Montana's invocation of its eleventh amendment immunity, the Blackfeet Tribe argues that Congress, in its enactment of the IGRA, abrogated the State's eleventh amendment immunity and, accordingly, jurisdiction lies with this court pursuant to 28 U.S.C. §§ 1331 and 1362.

The determinative issue is whether the IGRA operated to abrogate the State of Montana's eleventh amendment immunity. A correlative issue presented is whether the Indian Commerce Clause of the United States Constitution vests Congress with the constitutional power to abrogate the eleventh amendment immunity of the several states.[2]

The court holds that Congress does not have the authority under the Indian Commerce Clause to abrogate, through its enactment of the IGRA, the immunity provided the State of Montana by the eleventh amendment to the United States Constitution.

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[2] The Indian Commerce Clause is found in Article I, Section 8, Clause 3, of the United States Constitution which provides in pertinent part:

> The congress shall have Power to . . . [t] [sic] regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes; . . . .

I.

The IGRA was enacted in 1988 for the purpose of "provid[ing] a statutory basis for the operation of gaming by Indian Tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments. . . . " 25 U.S.C. § 2702(1). The Act preserves the regulation of "social" gaming and traditional forms of Indian gaming "engaged in by individuals as part of, or in connection with, tribal ceremonies or celebrations" to the exclusive jurisdiction of the Indian tribes. (Class I Gaming). Also preserved to the jurisdiction of the Indian tribes, but subject to oversight by the National Indian Gaming Commission, is a second class of gaming (Class II) that includes bingo, pull-tabs, lotto, punch boards, tip-jars, and other similar games. 25 U.S.C. § 2703(7)(A)(i). However, the IGRA provides that all other gaming activities (Class III) are lawful on Indian lands only if the gaming activities are "located in a State that permits such gaming for any purpose by any person, organization, or entity, the activities are authorized by an appropriately adopted and approved tribal ordinance or resolution and are conducted in conformance with a Tribal-State compact entered into by the Indian Tribe and the State in accordance with the following procedure:

> [a]ny Indian Tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall

> negotiate with the Indian Tribe in good faith to enter such a compact.

25 U.S.C. § 2710(d)(3)(A).

25 U.S.C. § 2710(d)(7)(A) states as follows:

> [t]he United States District Court shall have jurisdiction over . . . any cause of action initiated by an Indian Tribe arising from the failure of the State to enter into negotiations with the Indian Tribe for the purpose of entering into a Tribal-State compact . . . or to conduct such negotiations in good faith. . . .

The Blackfeet Tribe invokes the ostensible grant of jurisdiction to the federal district courts to entertain actions prosecuted by an Indian Tribe against a particular State for the State's alleged failure to abide by the mandate of section 2710(d)(7)(A).

The express language of 25 U.S.C. § 2710(b)(7)(A) undoubtedly establishes that Congress intended, through its enactment of the IGRA, to abrogate the immunity provided the several states by the eleventh amendment. *See, Kickapoo Tribe of Indians v. Kansas,* 818 F.Supp. 1423, 1427 (D.Kan. 1993); *Seminole Tribe of Florida v. Florida,* 801 F.Supp. 655, 658 (S.D. Fla. 1992); *Sault Ste. Marie Tribe of Chippewa Indians v. Michigan,* 800 F.Supp. 1484, 1488-89 (W.D. Mich. 1992); *Poarch Band of Cree Indians v. State of Alabama,* 776 F.Supp. 550, 557-58 (S.D. Ala. 1991); *Ponca Tribe of Oklahoma v. Oklahoma,* No. 92-988-T, sl.op. at 6 (W.D. Okla. Sept. 8, 1992); *Pueblo of Sandia v. State of New Mexico,* No. 92-0613-JC, sl.op. at 2 (D. N.M. Nov. 13, 1992). The more difficult question, however, and the question that has caused the courts significant consternation is whether Congress possess [sic] the authority to abrogate

the sovereign immunity of the several states when legislating pursuant to the Indian Commerce Clause. This court joins the majority of those district courts which have concluded that Congress does not have the power to abrogate a state's sovereign immunity when legislating pursuant to the Indian Commerce Clause. *See, Sault Ste. Marie Tribe of Chippewa Indians v. Michigan,* 800 F.Supp. at 1489-90; *Spokane Tribe of Indians v. Washington,* 790 F.Supp. 1057, 1060-61 (E.D. Wash. 1991); *Poarch Band of Cree Indians v. Alabama,* 776 F.Supp. at 559-62; *Ponca Tribe of Oklahoma v. State of Oklahoma,* sl.op. at 6-8; *Pueblo of Sandia v. State of New Mexico,* sl.op. at 3; *contra, Kickapoo Tribe of Indians v. Kansas,* 818 F.Supp. at 1427-32; *Seminole Tribe of Florida v. State of Florida,* 801 F.Supp. at 658-63.

The Blackfeet Tribe argues, as have the Indian Tribes in the cases cited, that the Indian Commerce Clause, like the Interstate Commerce Clause, vests Congress with the power to abrogate state sovereign immunity. This court agrees with the other district courts that have rejected the suggestion that Congress' authority under the Indian Commerce Clause is to be equated with Congress' plenary power under the Interstate Commerce Clause. *Sault Ste. Marie Tribe of Chippewa Indians, supra; Spokane Tribe of Indians, supra; Poarch Band of Cree Indians, supra.* This concurrence is predicated upon recognition of the fact that the "Interstate Commerce and Indian Commerce Clauses have very different applications . . . [and] [t]he extensive case law that has developed under the Interstate Commerce Clause is premised on the structural understanding of the unique role of the states in a constitutional system that is not readily imported to cases involving the Indian Commerce Clause." *Cotton Petroleum*

Corp. v. New Mexico, 490 U.S. 163, 192 (1989). The "mutuality of concession" underlying the relationship between the several states is absent in the relationship extant between the several states and Indian Tribes, *see, Blatchford v. Native Village of Noatak*, ___ U.S. ___, ___, 111 S.Crt. 2578, 2583 (1991). Accordingly, the jurisprudence that has developed relative to the Interstate Commerce Clause may not be relied upon to suggest that Congress has the power to abrogate the sovereign immunity of the several states under the Indian Commerce Clause. *See, Spokane Tribe of Indians*, 790 F.Supp. at 1061.

Because Congress has no authority to abrogate the State of Montana's eleventh amendment sovereign immunity to suit from an Indian Tribe by enacting legislation pursuant to the Indian Commerce Clause, this court does not have jurisdiction over the present action against the State of Montana under 28 U.S.C. §§ 1331, 1362, 2201.[3]

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[3] Invoking the rationale of *Parden v. Terminal Railway of Alabama Docks Dept.*, 377 U.S. 184 (1964), the Blackfeet Tribe argues that the State has "constructively waived" its eleventh amendment immunity by participating in negotiations with the Blackfeet Tribe for the purpose of effecting a compact under the IGRA. The doctrine of implied consent recognized in *Parden* is premised upon the voluntary participation by a state in a field of activity subject to congressional regulation. *Parden*, 377 U.S. at 196. The State of Montana participated in negotiations with the Blackfeet Tribe, not of its own volition, but pursuant to the mandate of the IGRA. Consequently, the rationale of *Parden* is inapposite.

Therefore, for the reasons set forth herein,

IT IS HEREBY ORDERED that the present action be, and the same hereby is DISMISSED for lack of jurisdiction.

DATED this 20th day of December, 1993.

/s/ Paul G. Hatfield
PAUL G. HATFIELD,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

The SPOKANE TRIBE OF INDIANS,
Plaintiff-Appellee,

v.

WASHINGTON STATE, the State of Washington; Booth Gardner, Governor of the State of Washington; Ken Eikenberry, Attorney General of the State of Washington; Franklin L. Miller, Deputy Director of the Washington State Gambling Commission, Defendants-Appellants.

The SPOKANE TRIBE OF INDIANS,
Plaintiff-Appellant,

v.

WASHINGTON STATE, the State of Washington; Booth Gardner, Governor of the State of Washington; Ken Eikenberry, Attorney General of the State of Washington; Franklin L. Miller, Deputy Director of the Washington State Gambling Commission, Defendants-Appellees.

Nos. 92-35113, 92-35446.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Oct. 5, 1993.

Decided July 6, 1994.

Indian tribe brought action against state and its officers alleging that state failed to negotiate in good faith with tribe concerning proposed gambling activities on reservation, as required by Indian Gaming Regulatory Act (IGRA). The United States District Court for the Eastern District of Washington, Fred L. Van Sickle, J., 790 F.Supp. 1057, granted in part and denied in part state's

and officer's motion to dismiss. State and officers appealed and tribe cross-appealed. The Court of Appeals, Schroeder, Circuit Judge, held that: (1) language of IGRA reveals clear intent to abrogate states' Eleventh Amendment immunity, and (2) Congress had authority to do so under Indian commerce clause.

Reversed and remanded.

Scott D. Crowell, Kirkland, WA, for plaintiff-appellee-cross-appellant.

Jonathan T. McCoy, Asst. Atty. Gen., Olympia, WA, for defendants-appellants-cross-appellees.

Howard L. Dickstein, Dickstein & Merin, and Thomas E. Gede, Sp. Asst. Atty. Gen., Sacramento, CA, for amici.

Hans Walker, Jr., Hobbs, Straus, Dean & Wilder, Washington, DC, for amicus curiae.

Appeal from the United States District Court for the Eastern District of Washington.

Before: GOODWIN, SCHROEDER, and PREGERSON, Circuit Judges.

Opinion by Judge SCHROEDER.

SCHROEDER, Circuit Judge:

This is a suit by the Spokane Tribe of Indians ("the Tribe") against the State of Washington to compel the state to negotiate in good faith for terms of a gaming compact as required by the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-21 (Supp.1994). The dispositive issue in this appeal and cross-appeal is whether

the state is immune from this suit under the Eleventh Amendment despite the fact that Congress, acting pursuant to its plenary constitutional power to regulate Indian affairs, clearly intended to authorize such suits. There is an existing circuit conflict on this issue. The Eighth Circuit has held that states are not immune. *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir.1993), while the Eleventh Circuit has held that they are. *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016 (11th Cir.1994). The district court in this case dismissed the action against the State, but permitted it to go forward against individual state officers under the doctrine of *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). We reverse, holding that the state is not immune from suit and that it is therefore unnecessary to proceed under *Ex Parte Young*.

I. *Statutory and Procedural Background*

Congress enacted the IGRA in 1988 in response to the 1987 Supreme Court decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987). The Ninth Circuit there had held that Public Law 280, 67 Stat. 588, as amended, 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1982 ed. & Supp. III), did not authorize California to enforce its gaming laws on Indian Reservations. Affirming the decision of this court, the Supreme Court held that because California did not prohibit gambling altogether, the gaming laws were not within Public Law 280's grant of criminal jurisdiction. The case left Indian tribes whose reservations lay in states that permit gaming free of any state regulation.

In the new statute, Congress created three classes of gaming: "Class I" consists of social games for minimal prizes and traditional Indian games; "Class II" includes Bingo and similar games of chance such as pull tabs and lotto; "Class III" includes all games not included in Classes I or II. 25 U.S.C. §§ 2703(6)-(8). In order to conduct Class III gaming on Indian lands, the interested tribe must enter into a Tribal-State Compact governing gaming with the state in which the Indian lands are located. 25 U.S.C. § 2710(d)(1)(C). This case involves Class III gaming that must be conducted in conformance with a Tribal-State Compact.

According to the statutory scheme, an Indian tribe initiates the negotiation process by requesting the state in which the tribe's lands are located to enter into negotiations for a gaming compact. 25 U.S.C. § 2710(d)(3)(A). "Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact." *Id.* If the state fails to negotiate in good faith, the statute confers jurisdiction on the United States district courts over "any cause of action initiated by an Indian tribe arising from a failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State Compact . . . or to conduct such negotiations in good faith." § 2710(d)(7)(A)(i). The court may then order the state and the tribe to reach an agreement within 60 days. § 2710(7)(B)(iii). If the parties do not reach agreement within the 60 day period after the court's order, the court is directed to appoint a mediator. If mediation fails, the Secretary of Interior is authorized to impose regulations after consultation with the mediator. § 2710(7)(B)(iv)-(vii).

In this case, the Tribe filed a request on November 14, 1988 with Governor Gardner to begin the process of negotiating a compact. Formal negotiations began in August of 1989. Although the parties met several times during 1990 and 1991, Washington rejected both the draft compact prepared by the Tribe and a universal compact submitted by the Tribe together with other Indian tribes. Finally, on June 4, 1991, Washington demanded that the Tribe either acquiesce to state jurisdiction and state-imposed limitations on gaming or pursue remedies under the IGRA.

The Tribe filed its complaint in this case on June 6, 1991, naming as defendants the State of Washington, Governor Gardner, State Attorney General Eikenberry, and Deputy Director Miller. The complaint alleged that the state had violated the IGRA. The Tribe sought a declaratory judgment that the state had failed to negotiate in good faith or enter into negotiations, and an injunction directing the parties to conclude a compact within 60 days.

Defendants filed a motion to dismiss on behalf of both the state and individual defendants. The district court granted the defendants' motion as to the state but denied it as to the individual defendants, 790 F.Supp. 1057. The individual defendants appealed the court's denial of their claim of immunity, and the district court certified that portion of his order dismissing the Tribe's action against the state for appeal pursuant to Fed.R.Civ.P. 54(b).

II. *Eleventh Amendment Immunity*

More than 100 years ago, the Supreme Court held in *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890) that the Eleventh Amendment of the United States Constitution bars suits by a citizen against the citizen's own state, as well as suits by citizens of another state.[1] In a series of more recent decisions, the Supreme Court has further refined the meaning of Eleventh Amendment immunity, holding that states may be subject to suit in federal court if they have consented to jurisdiction or if Congress has abrogated that immunity through the exercise of its constitutional power. *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305, 110 S.Ct. 1868, 1872, 109 L.Ed.2d 264 (1990) (state had waived Port Authority's immunity by specifically providing that the Port Authority could be sued with venue "laid within a . . . judicial district, established by . . . the United States"); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989) (Congress may abrogate state sovereign immunity under its Commerce Clause power, and CERCLA specifically effects such abrogation); *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 477, 107 S.Ct. 2941, 2947-48, 97 L.Ed.2d 389 (1987) (Congress had not clearly expressed intention to allow states to be sued under the Jones Act); *County of Oneida, N.Y. v.*

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[1] The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

Oneida Indian Nation, 470 U.S. 226, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985) (court did not have ancillary jurisdiction over question of state law, where state had not consented to suit in federal court as to that issue); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242-43, 105 S.Ct. 3142, 3147-48, 87 L.Ed.2d 171 (1985) (state had not waived immunity, and Congress had not abrogated it in the Rehabilitation Act); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976) (Congress may abrogate states' immunity under the Fourteenth Amendment). In this case, the Tribe has never contended that Washington consented to federal jurisdiction. The issue for us therefore is whether the statute has abrogated the state's immunity.

III. *Congressional Intent*

The Supreme Court has made clear that in order to overcome the Eleventh Amendment, congressional intent to abrogate immunity must be expressed unequivocally in the language of the statute. *See Port Auth. Trans-Hudson Corp.*, 495 U.S. at 305, 110 S.Ct. at 1872-73; *Atascadero State Hosp.*, 473 U.S. at 242-43, 105 S.Ct. at 3147-48; *Hale v. Arizona*, 993 F.2d 1387, 1391 (9th Cir.1993) (en banc), *cert. denied*, ___ U.S. ___, 114 S.Ct. 386, 126 L.Ed.2d 335 (1993). A general authorization to sue is not sufficient. *Atascadero State Hosp.*, 473 U.S. at 246, 105 S.Ct. at 3149-50.

Our discussion of congressional intent need not be lengthy. Every federal court that has considered the issue has concluded that the IGRA's language reveals a clear intent to abrogate the states' Eleventh Amendment immunity. *E.g., Cheyenne River*, 3 F.3d 273; *Seminole Tribes*,

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11 F.3d 1016. Section 2710(d) authorizes suit in federal court for injunctive relief. It further provides that once a tribe has introduced evidence that a tribal state compact has not been entered into and that the state has failed to respond to the tribe's request for negotiations or did not respond in good faith, the burden of proof is on the state to prove that it negotiated in good faith. § 2710(d)(7)(B)(ii). Congress' intent could not be much clearer. As one court stated:

> The tribe's suit and the federal court's jurisdiction are triggered under [section 2710(d)(7)(A)(i)] by the particular state's failure to negotiate in good faith. The state is the only possible defendant to such a suit, and it is the only other party to the compact negotiations. Congress fully contemplated and expressed its desire to give the tribes a federal forum by which they could compel the states to negotiate fairly with them. This is not just a permissible inference; it is the only reasonable inference. . . . Short of mentioning the Eleventh Amendment or sovereign immunity, a clearer statement of the intent to abrogate is difficult to envision.

Kickapoo Tribe v. Kansas, 818 F.Supp. 1423, 1427 (D.Kan.1993).

The more difficult issue we must decide is therefore whether Congress had the power to abrogate the states' immunity from suits by Indian tribes when it enacted the IGRA to regulate tribal gaming ventures.

IV. *Congressional Power and the Indian Commerce Clause*

The Supreme Court's recent decisions tell us that Congress has the authority to abrogate Eleventh Amendment immunity when it is exercising a constitutional provision that gives Congress plenary power over matters affecting the states. Such authority clearly exists with respect to § 5 of the Fourteenth Amendment. *See, e.g., Fitzpatrick,* 427 U.S. at 456, 96 S.Ct. at 2671 (Eleventh Amendment is "necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment"). The Court has also held that Congress possesses the power of abrogation under the Interstate Commerce Clause. *Union Gas,* 491 U.S. 1, 109 S.Ct. 2273.

The Supreme Court has never specifically addressed the intersection of federal power over tribes and state sovereign immunity that the IGRA represents. The Court in *Blatchford v. Native Village of Noatak,* 501 U.S. 775, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991), held that the Eleventh Amendment generally bars suits against a state by an Indian tribe. *Id.* at 779-84, 111 S.Ct. at 2581-83. While acknowledging that the states waived their immunity to suits by other states when they adopted the Constitution, the Court rejected the argument that Indian tribes could be treated as states for this purpose. The Court reasoned that the states' waiver vis a vis other states was founded upon a "mutuality of . . . concession," that was lacking between the states and Indian tribes. *Id.* But this holding, that a general waiver of immunity from suits against tribes cannot be inferred from the Constitution itself, does not address the question of whether Congress may

abrogate that immunity under the Indian Commerce Clause when it acts with the clarity of purpose that it did in the IGRA.

The Court's holding in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192, 109 S.Ct. 1698, 1716, 104 L.Ed.2d 209 (1989), upon which the district court relied, is similarly inapplicable. The Court there held only that a state could tax non-Indian oil and gas interests located on Indian lands and subject to tribal taxes without impermissibly burdening commerce "with" Indian tribes, even though such double taxation might impermissibly burden commerce "among" states if imposed on activity within another state. In reaching this conclusion, the Court noted that Interstate Commerce Clause doctrine cannot always readily be applied to cases involving the Indian Commerce Clause. This statement, however, does not speak to the scope of congressional power under either the Interstate Commerce Clause or the Indian Commerce Clause.

The Supreme Court case more closely related to our situation is *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989). The *Union Gas* Court held that Congress has the power to abrogate the states' immunity from suit under the Commerce Clause. The plurality opinion first noted that the states had necessarily "surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce," including any aspect of that sovereignty which would stand in the way of this congressional power. *Id.* at 14, 109 S.Ct. at 2281 (quoting *Parden v. Terminal Railway*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964), *overruled on other grounds by Welch v. Texas Dep't of Highways & Public*

Transp., 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987)). Next, the opinion noted that in *Fitzpatrick v. Bitzer*, the Court had held that Congress could abrogate the states' immunity under the Fourteenth Amendment for reasons that were precisely applicable to the Commerce Clause:

> "When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority."
>
> . . . .
>
> Each of these points is as applicable to the Commerce Clause as it is to the Fourteenth Amendment. Like the Fourteenth Amendment, the Commerce Clause with one hand gives power to Congress while, with the other, it takes power away from the States. . . . The important point, . . . is that the provision both expands federal power and contracts state power; that is the meaning, in fact, of a "plenary" grant of authority.

Id. 491 U.S. at 16-17, 109 S.Ct at 2282-83 (quoting *Fitzpatrick*, 427 U.S. at 456, 96 S.Ct. at 2671). Although Justice Brennan's opinion in *Union Gas* was a plurality opinion, a fifth Justice, Justice White, agreed that states are not immune from suit under statutes enacted pursuant to the Interstate Commerce Clause, provided the congressional intent is clear. 491 U.S. at 57, 109 S.Ct. at 2296 (White, J., concurring in part).

The district court in this case concluded that because "a significant difference exists" between congressional power under the Indian Commerce Clause and the Interstate Commerce Clause, there was "no basis" for holding that Congress could abrogate state sovereign immunity under the Indian Commerce Clause. We cannot agree with the district court that the differences between the Indian and the Interstate Commerce Clauses support state immunity from tribal suit where, as here, Congress has authorized such suits. Congress' power over both Indian and interstate commerce is set forth in Article I, § 8:

> The Congress shall have power,
>
> . . . .
>
> 3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes[.]

Moreover, the analysis developed by the Supreme Court in both *Union Gas* and *Fitzpatrick v. Bitzer* is equally applicable to the Indian Commerce Clause. In fact, the *Union Gas* plurality framed its opinion in terms of the Commerce Clause as a whole, and did not limit it to the Interstate Commerce Clause.

In this case, as in *Union Gas* and *Fitzpatrick*, Congress is acting under one of its plenary powers. As the Supreme Court explained in *Cotton Petroleum*, the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs. In 1832, the Supreme Court pronounced that the Indian Commerce Clause, together with Congress' constitutional power to conclude treaties with Indian tribes,

provide Congress with "all that is required" for complete control over Indian affairs. *Worcester v. Georgia,* 31 U.S. 515, 558, 8 L.Ed. 483 (1832).

This broad grant of power to Congress over Indian affairs necessarily limits the power of the states. Generally, unless Congress has authorized a state to apply its laws to Indian activities on a reservation, the state has no authority to do so. *Antoine v. Washington,* 420 U.S. 194, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975); *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); *Williams v. Lee,* 358 U.S. 217 (1959). The Supreme Court stated in *McClanahan* that " '[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the nation's history.' " 411 U.S. at 168, 93 S.Ct. at 1260 (quoting *Rice v. Olson,* 324 U.S. 786, 789, 65 S.Ct. 989, 991, 89 L.Ed. 1367 (1945)). Thus, "absent congressional action, a tribe retains its inherent right of self government and no state may impose its laws on the reservation." Stephen Pevar, *Rights of Indians and Tribes* 79 (1992). In a recent reaffirmation of this principle, the Supreme Court in 1991 stated that "Indian tribes are 'domestic dependent nations' which exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991).

Congressional power pursuant to the Indian Commerce Clause, then, cannot be less than its authority under the Interstate Commerce Clause. We therefore agree with District Judge Marcus when he said that:

> congressional power over both interstate and Indian commerce derives from the same clause in the Constitution; and we are hard pressed to

> conclude that the congressional authority to abrogate the States' immunity in the area of interstate commerce is greater than in Indian commerce. . . . [W]e conclude that, based on its paramount and plenary authority over Indian affairs, Congress' power to act pursuant to the Indian Commerce Clause is at least as great, if not greater, than its powers under the Interstate Commerce Clause.

Seminole Tribe v. Florida, 801 F.Supp. 655, 662 (S.D.Fla.1992), *rev'd*, 11 F.3d 1016 (11th Cir.1994). Reversing the district court in that case, the Eleventh Circuit questioned the continuing vitality of the *Union Gas* decision in light of changing Supreme Court membership and the lack of majority opinion. The case, however, remains binding authority upon us. Moreover, even if the Supreme Court were to overrule *Union Gas* and hold that Congress' power to regulate interstate commerce does not permit Congress to abrogate sovereign immunity, Congress' broader authority over tribal affairs would remain.

The IGRA was passed to fill a void in Indian gaming regulation that arose from the states' dependence on Congress for any authority to regulate tribal affairs. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987). In grappling with sensitive issues following the state of California's defeat in *Cabazon Band*, Congress tried to fashion a plan that would enable the states to have a voice in how tribal gaming should operate and in enforce to some degree the states' own laws. The states' immunity from suits under the Eleventh Amendment should not frustrate that goal. Indeed, principles of state sovereignty are singularly out

of place in such a scheme, where the federal government is tailoring a limited grant of power to the states. In this case, sovereign immunity would undermine rather than promote the assertion of state interests.

The Eleventh Circuit was concerned by the regulatory void that it might leave by invalidating the IGRA's provisions for federal judicial enforcement. Those concerns illustrate the problem caused when state sovereignty is injected into the federal scheme. The Eleventh Circuit reasoned that a void was not necessary because the provisions of the statute authorizing the Secretary of Interior to impose regulations would come into effect once a state asserted immunity from suit. When that occurred the Secretary of the Interior would, in the Eleventh Circuit's view, remain authorized to impose regulations for Class III gaming. *Seminole Tribe,* 11 F.3d at 1029. In our view, however, such a result would pervert the congressional plan. This is because the Secretary of the Interior under the statute is to act only as a matter of last resort, and then only after consulting with the court appointed mediator who has become familiar with the positions and interests of both the tribes and the states in court directed negotiations. 25 U.S.C. § 2710(d)(7)(B)(iv)-(vii). The Eleventh Circuit's solution would turn the Secretary of the Interior into a federal czar, contrary to the congressional aim of state participation.

For the foregoing reasons, we conclude that the State of Washington is not immune from this suit under the IGRA to enforce the clear congressional mandate that states negotiate in good faith with tribes to reach tribal gaming compacts. The judgment of the district court dismissing the action against the state is REVERSED. The

order of the district court permitting the case to go forward against the individual defendants under the doctrine of *Ex Parte Young* is VACATED because it is no longer necessary. *See Kentucky v. Graham*, 473 U.S. 159, 167 & n. 14, 105 S.Ct. 3099, 3106 & n. 14, 87 L.Ed.2d 114 (1985) (any immunity of state officers acting in their official capacities depends upon state immunity). Defendants contend that regardless of immunity, the case should be dismissed as to the individual defendants because the IGRA does not authorize suit against individual officers. The district court may consider this argument on remand.

REVERSED AND REMANDED.

No. 94-1344

Supreme Court, U.S.
FILED
MAR 9 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

JANET JESSUP, Administrator of the Gambling Control Division; MARC RACICOT, Governor of the State of Montana; JOE MAZUREK, Attorney General for the State of Montana; ANDY POOLE, Deputy Director of the Department of Commerce; JUDY BROWNING, Chief of Staff for Policy and Legal Affairs; and THE STATE OF MONTANA,

Petitioners,

vs.

THE BLACKFEET TRIBE OF THE BLACKFEET RESERVATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONSE IN OPPOSITION

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QUESTION PRESENTED

Whether Congress abrogated the state's Eleventh Amendment immunity from suit in federal court under its broad plenary authority to regulate Indian affairs in the enactment of the Indian Gaming Regulatory Act of 1988.

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OPINION AND ORDER BELOW

The Blackfeet Tribe instituted this action against the State of Montana pursuant to the provisions of the Indian Gaming Regulatory Act. The District Court dismissed the action on December 20, 1993, for lack of jurisdiction, holding that Congress did not abrogate the state's sovereign immunity in its enactment of the Act and that the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), 52 L. Ed. 2d 714, 28 S. Ct. 441, did not apply.

The Ninth Circuit Court of Appeals reversed and remanded the judgment of the District Court on the basis of *Spokane Tribe v. Washington*, 28 F.3d 991 (1994), *petition for cert. filed*, 63 U.S.L.W. 3209 (U.S. Aug. 29, 1994) (No. 94-357), entering this judgment on November 8, 1994.

STATEMENT OF THE CASE

Congress enacted the Indian Gaming Regulatory Act (IGRA) in 1988 in response to the 1987 Supreme Court decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987). The Ninth Circuit there had held that Public Law 280, 67 Stat. 588, as amended, 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1982 ed. and Supp. III), did not authorize California to enforce its gaming laws on Indian reservations. Affirming the decision of the Ninth Circuit Court, this Court held that because California did not prohibit gambling altogether, the gaming laws were not within the Public Law 280's grant of criminal jurisdiction. The case left Indian tribes whose reservations lay in states that permit gaming free of any state regulation.

In the enactment of IGRA, Congress created three classes of gaming. Class I consists of social games for minimal prizes and traditional Indian games. Class II includes bingo and similar

games of chance such as pull tabs and lotto. Class III includes all games not included in Class I or II. 25 U.S.C. § 2703 (6) - (8). In order to conduct Class III gaming on Indian lands, the interested tribe must enter into a tribal-state compact governing gaming with the state in which the Indian lands are located. 25 U.S.C. § 2710(d)(1)(c). This case involves Class III gaming that will be conducted in conformance with a tribal-state compact.

According to the statutory scheme of IGRA, an Indian tribe initiates the negotiation process by requesting the state in which the tribe's lands are located to enter into negotiations for a gaming compact. 25 U.S.C. § 2710(d)(3)(A). "Upon receiving such a request, the state shall negotiate with the Indian tribe in good faith to enter in such a compact." *Id.* If the state fails to negotiate in good faith, the statute confers jurisdiction on the federal district courts over "any cause of action initiated by an Indian tribe arising from a failure of a state to enter into negotiations with the Indian tribe for the purpose of entering into a tribal-state compact . . . or to conduct such negotiations in good faith." *Id.*, § 2710(d)(7)(A)(i). The court may then order the state and the tribe to reach an agreement within 60 days. *Id.*, § 2710(B)(iii). If the parties do not reach an agreement within the 60 day period after the court's order, the court is directed to appoint a mediator. If mediation fails, the Secretary of the Interior is authorized to impose regulations after consultation with the mediator. *Id.*, § 2710(7)(B)(iv) - (vii).

The Blackfeet Tribe and the State of Montana engaged in unsuccessful negotiations between 1989 and 1993. The Blackfeet Tribe filed this action pursuant to IGRA. Montana moved the court for a dismissal of the action asserting as a basis the Eleventh Amendment sovereign immunity from suit. The District Court granted the motion in December 1993, holding that it lacked jurisdiction over the state and its officials as Congress did not have the power to abrogate a state's sovereign immunity when

The Blackfeet Tribe appealed to the Ninth Circuit Court of Appeals. In November 1994, that court issued an order reversing the District Court for the reasons set forth in *Spokane Tribe v. Washington*, 28 F.3d 991 (9th Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3209 (U.S. Aug. 29, 1994) (No. 94-357).

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE NINTH CIRCUIT COURT IS CONSISTENT WITH THE DECISIONS OF THE EIGHTH CIRCUIT COURT, TENTH CIRCUIT COURT AND THE MAJORITY OF DISTRICT COURTS.

Although the Eleventh Circuit Court of Appeals in *Seminole Tribe v. Florida*, 11 F.3d 1016 (11th Cir. 1994), *cert. granted*, 115 S. Ct. 932 (Jan. 23, 1995), reached a different conclusion, the decision in this case is consistent with the decision of the Eighth Circuit Court of Appeals,, Ninth Circuit Court of Appeals and Tenth Circuit Court of Appeals in *Spokane Tribe v. Washington*, 28 F.3d 991 (9th Cir. 1994); in *Cheyenne River Sioux Tribe v. South Dakata*, 3 F.3d 273 (8th Cir. 1993); and *Ponca Tribe v. Oklahoma*, 37 F.3d 1422 (10th Cir. 1994), *petitions for cert. filed*, 63 U.S.L.W. 3477 (U.S. Dec. 9, 1994).

The Ninth Circuit cited *Worcester v. Georgia*, 31 U.S. 515, 8 L. Ed. 483 (1832), wherein this Court pronounced that the Indian Commerce Clause as set forth in the Constitution at Article I, Section 8, together with Congress' constitutional power to conclude treaties with Indian tribes provides Congress with all that is required for complete control over Indian affairs. The Ninth Circuit correctly reasoned that this broad grant of powers necessarily limits the power of the states and that unless Congress has authorized a state to apply its laws to Indian activities on a

reservation, the state has no authority to do so. *Antoine v. Washington,* 420 U.S. 194, 95 S. Ct. 944, 43 L. Ed. 2d 129 (1975); *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973); *Williams v. Lee,* 358 U.S. 217 (1959), 358 U.S. 217, 3 L. Ed. 251, 79 S. Ct. 269.

The Ninth Circuit also relied on this Court's decision in *Pennsylvania v. Union Gas Co.,* 491 U.S. 1, 109 S. Ct. 2273, 105 L. Ed. 2d 1 (1989), wherein the plurality opinion found that the states have necessarily "surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce, including any aspect of that sovereignty which would stand in the way of this congressional power." *Id.* at 14, 109 S. Ct. at 2281.

Although the Eleventh Circuit in *Seminole Tribe* questions the vitality of *Union Gas*, the Ninth Circuit Court determined that it remains binding authority upon it. It further stated that even if *Union Gas* were to be subsequently overruled, Congress' broad plenary authority over Indian affairs would remain intact.

Consequently, Montana's assertion of sovereign immunity from suit despite Congress' intent and authority manifested in the Indian Gaming Regulatory Act would undermine the well established doctrine of broad plenary authority over Indian affairs as developed by this Court and relied on by the Ninth Circuit.

II.

THE NINTH CIRCUIT COURT OF APPEALS HAS CORRECTLY DETERMINED THAT CONGRESS, USING ITS BROAD PLENARY AUTHORITY OVER INDIAN AFFAIRS, EXERCISED PROPER AUTHORITY TO ABROGATE A STATE'S SOVEREIGN IMMUNITY IN ITS ENACTMENT OF IGRA.

The Ninth Circuit correctly interpreted the issue of congressional authority to abrogate a state's sovereign immunity. Furthermore, subsequently to the Ninth Circuit's decision in *Spokane Tribe*, the Tenth Circuit in *Ponca v. Oklahoma*, 37 F.3d 1422 (10th Cir. 1994), examined the principle in *Dellmuth v. Muth*, 491 U.S. 223 (1989) and perceived no constitutional distinction between the plenary power conveyed by the Fourteenth Amendment, the Interstate Commerce Clause and the Indian Commerce Clause. This is consistent with the result of the Ninth Circuit Court's decision given the fact that this Court in *Union Gas* developed its opinion in terms of the Commerce Clause as a whole and did not sever the Interstate Commerce Clause and the Indian Commerce Clause from the overall clause.

CONCLUSION

For the reasons stated above, the Respondent Blackfeet Tribe respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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